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No. 95937-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD KILDUFF,

Appellant,

v.

SAN JUAN COUNTY, a Political Subdivision of the State of Washington,
and JAMIE STEPHENS, in his capacity as San Juan County Council
Member and San Juan County Public Records Officer,

Respondents.

**BRIEF OF AMICI CURIAE WASHINGTON ASSOCIATION OF
COUNTIES, ASSOCIATION OF WASHINGTON CITIES,
ASSOCIATION OF WASHINGTON CITIES RISK
MANAGEMENT SERVICE AGENCY, AND WASHINGTON
STATE TRANSIT INSURANCE POOL**

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I. INTRODUCTION

Like Respondent San Juan County (the “County”), numerous other state and local agencies—including the public agencies that Amici Washington State Association of Counties, Association of Washington Cities, Association of Washington Cities’ Risk Management Service Agency, and Washington State Transit Insurance Pool (collectively, “Amici”) represent—have adopted expeditious and accessible administrative review procedures under the Public Records Act, Chapter 42.56 RCW (the “PRA”). These administrative review procedures are consistent with and expressly contemplated by the PRA and further its purposes. By providing a process to identify and address potential mistakes and miscommunication at the outset, administrative review facilitates open and productive communication between agencies and requesters, enhances the quality of responsiveness to requests, brings certainty to what constitutes a final action triggering the right to judicial review, and helps avoid costly, protracted, and unnecessary litigation (or ensures an accurate and complete record for judicial review if issues remain). Amici respectfully request that the Court affirm that the adoption of administrative review procedures is permissible under the PRA.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington State Association of Counties (“WSAC”) is a non-profit association that serves all 39 counties throughout the State of Washington. Its members include elected county commissioners, council members, and executives. WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency managers, county human service administrators, clerks of county boards, and others.

The Association of Washington Cities (“AWC”) is a private, nonprofit, nonpartisan corporation that represents Washington’s cities and towns before the state legislature, the state executive branch, and regulatory agencies. All 281 cities and towns in Washington are members of AWC.

The AWC’s Risk Management Service Agency (“RMSA”) is one of several member pooling programs provided by AWC, which allow members to reduce costs and manage risk. RMSA is a member-owned risk pool providing property and liability coverage to 100 cities, towns, and special purpose districts in Washington. Since 2014, RMSA has provided coverage to its members for certain issues arising from PRA compliance and has paid out over \$400,000 for litigation costs related to PRA claims.

The Washington State Transit Insurance Pool (“WSTIP”) is a public agency formed pursuant to Chapter 48.62 RCW for the purposes of risk sharing, loss prevention, and insurance management. WSTIP’s membership consists of 25 transit agencies from communities across Washington.

III. STATEMENT OF THE CASE

Amici adopt the Statement of Case set forth in the County’s Answer to Statement of Grounds for Direct Review filed with this Court on July 5, 2018 and the Brief of Respondent filed with this Court on March 21, 2019.

IV. ARGUMENT

A. Administrative review procedures are consistent with, and expressly contemplated by, the PRA.

Contrary to Appellant’s protestations, administrative review procedures—like the County’s—are consistent with, and indeed expressly contemplated by, the PRA.¹ The PRA requires agencies to “adopt and enforce reasonable rules and regulations” regarding the “general course and method” by which it processes public records requests.² The purposes of those rules and regulations are “to provide full public access to public records,” “to prevent excessive interference with other essential functions of the agency,” and to “provide for the fullest assistance to inquirers and the

¹ See, e.g., Amended App. Br. 1, 15-27; App. Reply Br. 1-11.

² RCW 42.56.040(1)(b); RCW 42.56.100.

most timely possible action on requests for information,” among other purposes.³ In a similar vein, agencies must “establish mechanisms for the most prompt possible review of decisions denying inspection”⁴ As with other statutory frameworks regarding judicial review of agency decisions, the PRA provides for judicial review only after the agency has engaged in “final action” denying access to a record.⁵

Consistent with those requirements and in furtherance of the purposes of the PRA, the County adopted a quick and accessible administrative review process in which requesters must first submit a request for review to the County Prosecuting Attorney to identify and resolve mistakes and miscommunication before filing suit.⁶ The Prosecuting Attorney then has two business days to review and address the issues identified by the requester.⁷ If the requester is dissatisfied with the resolution reached through the administrative review process or if issues otherwise remain, the requester may file suit under the PRA starting two business days after the request for review was submitted.⁸

³ See RCW 42.56.100.

⁴ RCW 42.56.520(4).

⁵ See RCW 42.56.520; *Hobbs v. State*, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014).

⁶ San Juan County Code (“SJCC”) 2.108.130.

⁷ *Id.*

⁸ *Id.* at (C).

Numerous of Amici's members have adopted administrative review procedures that are identical in either form or function to the County's.⁹ The only difference among the policies is whether the additional layer of review is conducted by the Prosecuting Attorney or a department head or elected official.¹⁰ Many state agencies, including state departments,¹¹ offices,¹² commissions,¹³ and educational institutions,¹⁴ have also adopted similar procedures.

⁹ See, e.g., Douglas County Code 2.51.130; Kitsap County Code 3.76.120(4); Revised Code of Wahkiakum County 2.146.030(A), (B); Grant County Code 2.72.180(a); Pacific County, Resolution No. 2018-005, § 14 (Jan. 23, 2018); Jefferson County Public Records Act Compliance Policy, §§ 9, 9.1, 9.5 (Oct. 27, 1997, last updated May 29, 2018); Whitman County, Resolution No. 070275, § 11 (effective Jan. 19, 2010).

¹⁰ E.g., compare Douglas County Code 2.51.130 with Resolution No. 070275, § 11.

¹¹ See, e.g., WAC 332-10-110(3) (Department of Natural Resources); WAC 415-06-080(3) (Department of Retirement Systems); WAC 67-10-130(3) (Department of Services for the Blind); WAC 208-12-110(3) (Department of Financial Institutions); WAC 192-15-050(3) (State Employment Security Department).

¹² See, e.g., WAC 240-06-110(3) (Office of the Governor); WAC 434-690-100(3) (Secretary of State); WAC 1-06-110(3) (Office of the Code Reviser); WAC 474-01-110(3) (State Treasurer's Office); WAC 326-07-120(3) (Office of Minority and Women's Business Enterprises).

¹³ See, e.g., WAC 342-10-120(5) (Oceanographic Commission); WAC 322-12-120(3) (Commission on Hispanic Affairs); WAC 255-01-130 (Washington State Historical Society); WAC 30-04-080(3) (Arts Commission); WAC 417-02-140(3) (Redistricting Commission); WAC 34-04-100(3) (Commission on Asian Pacific American Affairs); WAC 467-02-120(3) (Traffic Safety Commission).

¹⁴ See, e.g., WAC 132B-276-110(3) (Grays Harbor College); WAC 132V-24-110 (Tacoma Community College); WAC 132K-276-110(3) (Pierce College); WAC 137-276-110(3) (Board for Community and Technical Colleges); WAC 132L-276-110(3) (Centralia College); WAC 132G-276-110(3) (Shoreline Community College); WAC 132J-276-110 (Green River Community College); WAC 132Q-276-110(3) (Community Colleges of Spokane); WAC 132P-276-090(3) (Yakima Valley Community College).

Although Appellant makes much of the fact that the Attorney General's model rules state that "[a]ny person may obtain court review of denials of public records . . . at the conclusion of two business days after the initial denial regardless of any internal administrative appeal," those rules are "advisory only and do not bind any agency."¹⁵ The Attorney General's own procedures also contravene Appellant's interpretation. Just like the County's, the Attorney General's PRA procedures provide that a requester must first file a petition for review with the Attorney General for administrative remedies to be considered exhausted for purposes of judicial review.¹⁶ And again, just like the County's, the Attorney General's procedures provide that it "shall have concluded a public record is exempt from disclosure," for which judicial review is available, "only after th[at] review . . . has been completed."¹⁷ Indeed, many state entities have adopted administrative procedures to address public record requests, presumably all with the advice of the Attorney General's office.¹⁸

¹⁵ See, e.g., App. Reply Br. 9; WAC 44-14-00003.

¹⁶ See WAC 44-06-120(3) ("[a]dministrative remedies shall not be considered exhausted until the attorney general or the designated deputy attorney general has returned the petition with a decision or until the close of the second business day following **receipt of the written request for review of the denial** of the public record, whichever occurs first.") (emphasis added).

¹⁷ *Id.* at (4).

¹⁸ See *supra*, notes 11-14.

B. Administrative review procedures further the purposes of the PRA.

The administrative review procedures adopted by the County and a growing number of other state and local agencies are not only consistent with the PRA's plain language, but also further its purposes.

1. Administrative review ensures that mistakes and miscommunication are timely identified and addressed.

State and local agencies respond to a significant number of public records requests.¹⁹ “The workload and expense of responding to requests affects governments of all types and sizes.”²⁰ With “[a]dvances in technology” and “the exponential growth . . . of digital information [agencies] must manage,” responding to PRA requests has only grown more costly, complex, and onerous.²¹ Miscommunication and mistakes happen (due in no small part to that increasing cost and complexity). As a result,

¹⁹ See Washington State Auditor's Office, *Performance Audit: The Effect of Public Records Requests on State and Local Governments* 4, 17 (2016) [hereinafter “Auditor's Report”]. For example, annually the average number of public records requests received by a city or town is 639, by a county is 731, and by a state agency, commission, or board is 1,019. *Id.* at 4.

²⁰ See *id.* at 5. “Small governments may struggle with responding to requests, even if they receive few of them, because they have limited staff and technological capabilities to complete them.” *Id.* “Some larger governments also struggle because they receive a larger volume of requests, many of which require considerable coordination between offices and staff, drawing heavily on resources.” *Id.*

²¹ *Id.*

there have been a number of significant awards of penalties and fees in PRA cases.²²

For example, the agencies that participated in the report by the State Auditor's Office together spent more than \$10 million on PRA litigation in a single year.²³ Litigation costs include settlement payments, legal review and counsel, and court-ordered fees and penalties.²⁴ "Settlement payments and attorney costs account for nearly 80% of all litigation expenses."²⁵ Amici RMSA's membership has paid over \$400,000 for litigation costs related to PRA litigation since 2014, with litigation costs associated with just one requester totaling almost \$150,000. These staggering costs may force agencies, particularly those with limited resources, to settle regardless of the merits. For example, the City of Prosser settled a public records lawsuit for \$175,000 because it faced costs that likely exceeded \$500,000 to bring the case to trial.²⁶

Administrative review ensures that requesters have full and timely access to the records they desire by providing a mechanism to identify and address issues relating to an agency's response before filing a lawsuit. This

²² *See infra*, notes 37-44.

²³ Auditor's Report at 27.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 27. The lawsuit related to 41 of 123 PRA requests made by the same requestor within a single year. *Id.*

is consistent with the PRA's directive that an agency's rules and regulations "provide for the fullest assistance to inquirers and the most timely possible action on requests for information."²⁷ The PRA is best served by timely and full disclosure, not litigation.

To that end, administrative review ensures that both parties understand if, when, and why the agency has taken "final action" to deny access to a record, which is a prerequisite to suit under the PRA.²⁸ The "final action" requirement presents two potential areas of confusion: whether and when an agency has denied access to a record, and whether the action with which the requester takes issue was "final." The potential for confusion is compounded by the fact that the PRA does not define what constitutes a denial.²⁹ This case presents an apt example. Here, the Appellant admits that the County understood that it had responded completely to Appellant's request and asked the Appellant to confirm whether that understanding was correct, or clarify if he wished to receive additional documents.³⁰ The Appellant never responded.³¹ Because the

²⁷ RCW 42.56.100.

²⁸ See RCW 42.56.520; *see also Hobbs*, 183 Wn. App. at 936-37 ("Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA **after** the agency has engaged in some final action denying access to a record.") (emphasis in original).

²⁹ See generally RCW 42.56 *et seq.*

³⁰ Amended App. Br. 8.

³¹ The trial court found that the Appellant "did not contact San Juan County to follow up or request additional records" or "express any dissatisfaction with the

County understood its response to be complete and the Appellant declined to correct that perceived misunderstanding, the County had no way of knowing that Appellant construed its response to be a “denial” warranting judicial review. Likewise, it is impossible for an agency to provide “a written statement of the specific reasons for a denial,” as the PRA requires, if it does not knowingly deny a request.³² In other words, an agency cannot deny access to records that it does not yet know a requester wants, and it certainly cannot articulate “specific reasons” for doing so.

Requiring requesters to submit a request for review of a perceived denial promotes full and open communication between the parties about the scope and nature of the records requested and if, when, and why the agency has denied access to them. This approach benefits good faith requesters. It also ensures that requesters do not capitalize on that confusion to further other, unrelated motives, such as obtaining a litigation advantage, as the trial court found that Appellant did in this case.³³

County’s response or disagree with the description of the agreement reached with Mr. Gaylord.” *See* Resps.’ Answer to Statement of Grounds for Direct Review, App. B (trial court’s Findings of Fact, Conclusions of Law, and Order Dismissing Public Records Act Claims [hereinafter “Findings and Conclusions”]), ¶ 7.

³² *See* RCW 42.56.520 (“[d]enials of requests must be accompanied by a written statement of the specific reasons therefor.”).

³³ Findings and Conclusions, ¶ 8 (finding that “Mr. Kilduff purposely did not use the County’s internal review procedures because he thought ‘doing so might jeopardize his position in this and other litigation which was pending between Mr. Kilduff and San Juan County.’”).

Administrative review is particularly useful to requesters seeking records from public agencies with limited resources.³⁴ For example, many small cities and towns have only one person on staff—usually the clerk—with any significant experience with or understanding of the PRA. That person usually has other, unrelated tasks and responsibilities that they must balance with their obligations to respond to PRA requests. These employees sometimes make mistakes (the likelihood of which may increase if that person is unavailable or is new to the position when the request is received). For example, in a lawsuit covered by Amici RMSA, a clerk for a small town of only 115 residents asked a requester to clarify whether he wished to receive responsive records in hard copy or electronic format, but neglected to send the records after the requester responded.³⁵ The first notice the City received of this error was the lawsuit filed months later. Administrative review procedures would help avoid situations like these by ensuring that requestors are not forced to go to the courts to resolve issues that could easily be addressed, or at least streamlined or clarified, by addressing them with the agency first.

³⁴ See, e.g., Auditor's Report at 5 ("Small governments may struggle with responding to requests, even if they receive few of them, because they have limited staff and technological capabilities to complete them.").

³⁵ See Complaint for Damages, *Kirby v. Town of Hatton*, No. 15-2-0093-8, at ¶¶ 2.1-2.7 (Adams County Super. Ct. June 2, 2015). Hatton has only 115 residents. See MRSC, *Washington City and Town Profiles* (2019), <http://mrsc.org/Home/Research-Tools/Washington-City-and-Town-Profiles.aspx>.

2. Administrative review ensures that agencies can fully assist requesters without unduly interfering with agency functions.

By focusing agency resources (including the involvement of officials who are integral to the essential functions of the agency) on effectively addressing and resolving issues that arise, administrative review strikes the fine balance between providing the fullest assistance to requesters and ensuring the agency can perform its essential functions.³⁶ This balance is one of the purposes of the PRA.³⁷ It is simply not feasible for key officials, such as the Prosecuting Attorney or department heads, to be involved in and oversee every PRA response. Administrative review processes thus properly ensure that the efforts of those with relevant expertise and experience are ultimately responsible for addressing PRA requests that require or will benefit from their involvement.

3. Administrative review minimizes or avoids unnecessary, costly, and protracted litigation.

Administrative review benefits both agencies and requesters by avoiding unnecessary, costly, and protracted litigation that serves the

³⁶ See RCW 42.56.100 (requiring agencies to “adopt and enforce reasonable rules and regulations” to both “prevent excessive interference with other essential functions of the agency” and at the same time “provide for the fullest assistance to inquirers and the most timely possible action on requests for information”); *see, e.g., Zink v. City of Mesa*, 140 Wn. App. 328, 342 n.6, 166 P.3d 738 (2007) (the PRA “provides that an agency can adopt rules to provide for compliance with the PRA in a manner most conducive to the orderly administration of business.”).

³⁷ *See id.*

interests of neither party.³⁸ As the report by the State Auditor's Office concludes, "[p]roviding a user-friendly process for disputing government decisions on records requests can help address requesters' concerns that might otherwise result in costly litigation."³⁹

As detailed above, "[p]ublic records litigation can have a severe impact on the financial position of some governments, especially those with small operating budgets."⁴⁰ An administrative review process ensures that requesters do not exploit mistakes to gain a litigation advantage, including by intentionally accumulating penalties that are the result of good faith confusion or miscommunication. For example, one requester has targeted numerous small cities, towns, and school districts with PRA requests primarily regarding recent state audits and then waited months before filing suit for unintentional errors, seeking maximum statutory penalties.⁴¹ In one such case, the requester communicated with a single staff person from the

³⁸ Auditor's Report at 35.

³⁹ *Id.*

⁴⁰ *Id.* at 6.

⁴¹ See Justin Burnett, *School district, city again hit with public records lawsuits*, South Whidbey Record, March 25, 2016, <http://www.southwhidbeyrecord.com/news/school-district-city-again-hit-with-public-records-lawsuits/>; Jake Thomas, *Lawsuits target Clark County, Clark College over public records law*, The Columbian, Aug. 5, 2019, <https://www.columbian.com/news/2019/aug/05/lawsuits-target-clark-county-clark-college-over-public-records-law/>; The Associated Press, *Mount Vernon School District settles public-records lawsuit*, Seattle Times, Feb. 20, 2018, <https://www.seattletimes.com/seattle-news/mount-vernon-school-district-settles-public-records-lawsuit/>

City of Morton, who incorrectly stated that she could not process his request until he submitted a completed public records request form.⁴² The requester then filed a lawsuit six months later seeking accumulated daily penalties, among other damages.⁴³ In another case involving the same requester, the town of Springdale informed the requester that relevant documents would be uploaded to the town's website after an upcoming town meeting, but neglected to send the website link to the requester after the documents were posted.⁴⁴ Seven months later, and again without further communication with the town or a good faith effort to inform the town of its error, the requester filed suit seeking the accumulated maximum statutory penalties.⁴⁵

PRA litigation negatively impacts requesters too. For example, the “risk of litigation tends to make governments more cautious in their dealings with the public, inadvertently slowing down the records disclosure process. Such caution is expensive and the delays may further expose governments to legal risk as some requesters may accuse the government of an unreasonable response time.”⁴⁶ Administrative review thus ensures that

⁴² Complaint for Disclosure and Production of Public Records, *Hood v. City of Morton*, No. 18-2-0072921, at ¶¶ 3.2-3.3 (Lewis County Super. Ct. June 27, 2018).

⁴³ *See id.*

⁴⁴ *See* Complaint for Violation of the Public Records Act, *Hood v. Town of Springdale*, No. 19-2-0036-33, at ¶¶ 3.2-3.5 (Stevens County Super. Ct. Jan. 22, 2019).

⁴⁵ *See generally id.*

⁴⁶ Auditor's Report at 28.

requesters receive prompt and full assistance from agencies. Administrative review is also beneficial to requesters for whom filing and prosecuting a PRA lawsuit is not feasible or affordable.

V. CONCLUSION

The County's administrative review procedures, like those of many of Amici's members, are consistent with and further the PRA's purposes. Amici respectfully request that the Court confirm that administrative review procedures are permissible under the PRA.

RESPECTFULLY SUBMITTED this 13th day of September,
2019.

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I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 13th day of September, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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September 13, 2019 - 4:47 PM

Transmittal Information

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Appellate Court Case Title: Edward Kilduff v. San Juan County, et al.
Superior Court Case Number: 16-2-00718-2

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